Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

GRAHAM C. FARIA,

Petitioner,

v.

TOWN OF PALM BEACH,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Under the Americans With Disabilities Act of 1990, is the issue of whether a job applicant poses a direct threat to the health or safety of others an element of a plaintiff's prima facie case for discrimination or is it an affirmative defense?

PARTIES BELOW

The Petitioner, Graham C. Faria, was the Plaintiff / Appellant in the courts below.

The Town of Palm Beach was the Defendant / Appellee in the courts below. Joseph Terlizzese, the Chief of Police, was initially named as a Defendant but was dismissed by the district court.

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1998

GRAHAM C. FARIA,

Petitioner

vs.

TOWN OF PALM BEACH,

Respondent.

OPINIONS BELOW

The Eleventh Circuit's opinion is unreported, and is reprinted in the appendix at App. 1a. The district court's order granting summary judgment is unreported, and is reprinted in the appendix at App. 2a.

STATEMENT OF JURISDICTION

Jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1). Jurisdiction in the district court was pursuant to 28 U.S.C. § 1331. Judgment was entered on December 17, 1998.

STATUTORY PROVISIONS INVOLVED

Americans With Disabilities Act of 1990, 42 U.S.C. § 12111 *et seq.*

§ 12112. Discrimination
(a) General rule

No covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.

§ 12113. Defenses
(a) In general

It may be a defense to a charge of discrimination under this chapter that an alleged application of qualification standards, tests, or

selection criteria that screen out or tend to screen out or otherwise deny a job or benefit to an individual with a disability has been shown to be job-related and consistent with business necessity, and such performance cannot be accomplished by reasonable accommodation, as required under this subchapter.

(b) Qualification standards

The term "qualification standards" may include a requirement that an individual shall not pose a direct threat to the health or safety of other individuals in the workplace.

§ 12111. Definitions

(3) Direct Threat

The term "direct threat" means a significant risk to the health or safety of others that cannot be eliminated by reasonable accommodation.

STATEMENT OF THE CASE

"[W]e didn't call your doctor or look at any of your blood tests, because these incident reports are enough to fail you. . . . We don't hire diabetics, we have had problems with them in the past." This statement, made by a physician to the Petitioner, Mr. Graham Faria, during a pre-employment medical examination for the Town of Palm Beach ("Palm Beach"), Florida, captures the essence of this case in the district court.

Petitioner, an experienced law enforcement officer who is an insulin-dependent diabetic, applied for employment with the police department of Palm Beach. Although Petitioner passed all physical fitness and other pre-employment tests, and was in excellent health when he applied for a position as a police officer, Palm Beach refused to hire him stating that he could not perform the essential functions of the job, and that the medical examination revealed he posed a significant risk of harm to himself and others which could not be safely accommodated.

Petitioner brought an action in district court against Palm Beach and the Chief of Police asserting, *inter alia*, discrimination against him as a diabetic, in violation of the Americans With Disabilities Act of 1990 ("the ADA"). The case proceeded against Palm Beach only on the ADA claim.

Following discovery, Palm Beach filed a motion for summary judgment claiming, *inter alia*,

that Petitioner was not disabled as defined by the ADA, and that he was not a qualified individual under the ADA because the possibility of a hypoglycemic occurrence on the job rendered him a direct threat to the health and safety of others.

The district court granted summary judgment for Palm Beach. The district court found Petitioner met the definition of disabled, but granted summary judgment on the ground that "[n]o genuine issues of material fact exist with respect to whether Faria is a qualified individual under the ADA." App. 10a, 13a. In reaching this decision, the district court applied *Moses v. American Nonwovens, Inc.*, 97 F.3d 446 (11th Cir. 1996), and said "[t]he employee retains at all times the burden of showing that he was not a direct threat or that reasonable accommodation was available to eliminate the threat." App. 11a. The district court thus placed the burden on Petitioner to prove a negative---that he would not present a direct threat to others if hired as a police officer. App. 11a-13a.

On appeal the Eleventh Circuit Court of Appeals affirmed *per curiam*. App. 1a. This petition followed.

REASON FOR GRANTING THE WRIT

This Court should resolve the conflict among the circuit courts on whether the burden to prove a direct threat of harm rests with the plaintiff or defendant.

The circuit courts of appeals are in conflict on which party bears the burden to prove that the employee or job applicant who is disabled under the ADA does not pose a direct threat of harm to others. *See* 42 U.S.C. § 12113. Two courts have squarely held it is the plaintiff's burden and two courts have squarely held it is the defendant's burden.

1. The Eleventh and First Circuits Burden the Plaintiff

The Eleventh Circuit placed this burden on Petitioner. *See Moses v. American Nonwovens, Inc.*, 97 F.3d 446 (11th Cir. 1996)(holding "[t]he employee retains at all times the burden of persuading the jury either that he was not a direct threat or that reasonable accommodations were available").

The First Circuit in *E.E.O.C. v. Amego, Inc.*, 110 F.3d 135 (1st Cir. 1997), arrived at the same conclusion. The court found §§ 12112 and 12113 did not resolve who bears the burden of proof on the direct threat issue. Turning to legislative history for guidance, the circuit court quoted the House Report, saying with respect to "the definition of 'direct threat,'

'[t]he Committee intends to codify the direct threat standard used by the Supreme Court in *School Board of Nassau County v. Arline* [480 U.S. 273 (1987)].'" 110 F.3d at 143 (footnote and citation omitted). Further quoting the House Report, the circuit court noted that "'[i]f the applicant is otherwise qualified for the job, he or she cannot be disqualified on the basis of a physical or mental condition unless the employer can demonstrate that the applicant's disability poses a direct threat to others in the workplace. . . . The plaintiff is not required to prove that he or she poses no risk.'" *Id.* (citation omitted).

The First Circuit interpreted the intent to codify *Arline* as suggesting the plaintiff must prove the disability poses no risk of harm to others as part of proving he or she is qualified for employment. The court thus held that when a disabled employee's essential job functions necessarily implicate the safety of others, the employee must demonstrate those functions can be performed without endangering others, but did not adequately distinguish the excerpt from the House Report placing the burden on the employer without exception. *Id.*

2. The Fifth and Eighth Circuits Burden the Defendant

In contrast, the Fifth and Eighth Circuits have held that the direct threat issue is an affirmative defense on which the employer bears the burden of proof. *See Rizzo v. Children's World Learning Centers, Inc.*, 84 F.3d 758, 764 (5th Cir. 1996)("As

with all affirmative defenses, the employer bears the burden of proving that the employee is a direct threat"); *Benson v. Northwest Airlines, Inc.*, 62 F.3d 1108, 1112 (8th Cir. 1995)(acknowledging the employer's burden to prove employee cannot perform job functions even with reasonable accommodation).

In *Benson*, the Eighth Circuit distinguished the plaintiff's burden of proof from the defendant's burden of production:

> Once the plaintiff makes 'a facial showing that reasonable accommodation is possible,' the burden of *production* shifts to the employer to show that it is unable to accommodate the employee . . . If the employer shows that the employee cannot perform the essential functions of the job even with reasonable accommodation, the employee must rebut that showing with evidence of his individual capabilities. At that point, the employee's burden merges with his ultimate burden of persuading the trier of fact that he has suffered unlawful discrimination. *See Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 256, 101 S. Ct. 1089, 1095, 67 L. Ed. 2d 207 (1981)(Title VII case) *quoted in Hicks*, ___ U.S. at ___, 113 S. Ct. at 2752.

62 F.3d at 1112 (citations and footnotes omitted)(emphasis in original).[1] The inquiry as to whether the plaintiff poses a direct threat of harm is subsumed in the employer's burden to produce evidence that the plaintiff cannot perform the essential job functions even with reasonable accommodation.

The Seventh Circuit seems to be aligned with the Fifth and Eighth Circuits in *E.E.O.C. v. AIC Security Investigations, Ltd.*, 55 F.3d 1276 (7th Cir. 1995). Although the burden of proof question was not squarely presented, the court repeatedly referred to the direct threat issue as a defense. *Id.* at 1283-84.

CONCLUSION

For the foregoing reason, certiorari should be granted, the decision of the circuit court reversed, and the case remanded for trial with instructions for Palm Beach to bear the burden to prove Petitioner poses a

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[1] In *Moses*, the Eleventh Circuit overstated the holding of *Benson*. The Eighth Circuit said: "The employee at all times retains the burden of persuading the trier of fact that he has been the victim of illegal discrimination due to his disability." 62 F.3d at 1112. The Eleventh Circuit cited *Benson* for the proposition that the employee retains the burden to prove he was not a direct threat. 97 F.3d at 447. The burden to prove illegal discrimination is not the same as the burden to prove the direct threat defense. In fact, the direct threat issue was not presented to the Eighth Circuit in *Benson*. 62 F.3d at 1112.

direct threat of harm to others even with reasonable accommodations for his diabetes.

Respectfully submitted,

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APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT DATED, ENTERED AND FILED DECEMBER 17, 1998

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 97-5939

D. C. Docket No. 95-8343-CV-KMM

GRAHAM C. FARIA,

Plaintiff-Appellant,

versus

TOWN OF PALM BEACH;
POLICE CHIEF, Joseph L. Terlizzese,

Defendants-Appellees.

Appeal from the United States District Court
for the Southern District of Florida

(December 17, 1998)

Before ANDERSON and DUBINA, Circuit Judges, and FAY, Senior Circuit Judge.

PER CURIAM:

Even considering only the facts known to the Town at the time of the decision, the judgment of the district court is due to be affirmed.

AFFIRMED.

APPENDIX B — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA, MIAMI DIVISION DATED AND FILED NOVEMBER 10, 1997

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA MIAMI DIVISION

Case No. 95-8343-CIV-MOORE

GRAHAM C. FARIA,

Plaintiff,

vs.

TOWN OF PALM BEACH,
POLICE CHIEF JOSEPH L. TERLIZZESE,

Defendant.

ORDER

THIS CAUSE came before the Court upon Defendant's Motion for Summary Judgment (D.E. #43).

UPON CONSIDERATION of the motion, responses, materials submitted, the pertinent portions of the record, and being otherwise fully advised in the premises, the Court enters the following Order.

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BACKGROUND[1]

The Plaintiff, Graham C. Faria ("Faria"), sues the Town of Palm Beach ("Palm Beach") for discrimination under the Americans With Disabilities Act.

Faria has insulin-dependent diabetes and consequently his body requires insulin to regulate his blood sugar levels. Faria applied for a job as a police officer with Palm Beach on February 1, 1994. Faria's application was processed by Palm Beach and he was given a physical agility test, writing test and he submitted for personal interviews. Palm Beach later informed Faria that he had successfully completed the first phase of the examination process and that his name was placed on the eligibility list for employment. Consequently, Palm Beach required Faria to undergo a background investigation, psychological examination and a medical examination.

In the course of the background investigation, Palm Beach obtained documents from Faria's employment at the Palm Beach County Sheriff's Office[2] ("PBSO") indicating that he had experienced hypoglycemic reactions while employed there and while attending the police academy. The number and severity of these attacks are in dispute by the parties.

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1. Unless otherwise noted, the following facts are undisputed.

2. Faria worked as a corrections officer for PBSO until April, 1995.

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Joseph Ojea, M.D. ("Dr. Ojea") conducted a physical examination of Faria. Dr. Ojea determined that Faria was not medically qualified for the position of police officer due to his history of hypoglycemic attacks. Dr. Ojea testified during deposition that Faria suffers from a condition known as "hypoglycemic unawareness" and that he falls into hypoglycemic attack quickly and without warning. Dr. Ojea believed that Faria posed a significant risk of substantial harm to himself and others which could not be safely accommodated. As a result, Faria was informed by Palm Beach that he did not qualify for police officer.[3]

It is undisputed that when Faria is not experiencing low blood sugar he is in excellent health. Faria passed all of the physical fitness tests required by Palm Beach. Faria testified that he has never called in sick because of his diabetes.

However, the record reflects numerous hypoglycemic attacks. Many of those occurred while Faria was working. The PBSO reports reveal that Faria suffered a hypoglycemic attack in 1992 while attending the police academy. The report

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3. Palm Beach notified Faria that he had been rejected for the Police Officer position, stating:

> This is to inform you that you will not receive a final offer of employment because you cannot perform the essential functions of the position of Police Officer in the Town of Palm Beach. Your medical examination reveals that you are susceptible to physical symptoms that can appear without warning, which pose a significant risk of harm to yourself and others and which cannot be safely accommodated.

of the 1992 incident described Faria as sweating, disoriented, unable to support himself and unable to stay awake without being prodded. Tracy Gonzalez, a co-worker who witnessed this incident, described Faria as having difficulty staying awake, glassy eyed, disoriented, and unable to communicate.

The reports also document a 1994 disabling hypoglycemic seizure in the central control room at the county jail. During this incident, Faria is described as incoherent and oblivious to his surroundings. In the report of the 1994 incident Faria's supervisor wrote that this incident is not the first. He noted that this is the fourth or fifth time that Faria has had a hypoglycemic seizure. The report specifically refers to a similar incident occurring in another control room about a year and a half before the 1994 incident. Lt. Schime, a witness to the above-mentioned 1994 attack, described Faria as disoriented, swinging his arms as if he was in slow motion, glassy-eyed and unresponsive. Lt. Schime testified that Faria locked himself in the control room and it took perhaps five minutes before they could talk him into pushing the button to open the door.

Hospital records from the Martha's Vineyard, where Faria has lived since May, 1995, document at least five disabling hypoglycemic attacks. During one of these attacks, an EMT described Faria as rigid, combative and unresponsive to verbal commands. The EMT added that Faria spit out an attempt to administer glucose by mouth and that he had to be restrained and handcuffed to a body board. Additionally, the EMT testified during deposition that Faria, before being restrained, had moved wildly throughout his apartment and in an aggressive manner toward persons in his proximity.

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During one of these attacks in March 8, 1997, the EMT found Faria unresponsive to verbal commands. The report noted that Faria had been combative when his mother attempted to give him glucose. On March 22, 1997, Faria's mother is reported to have found him lying on his bed having a hypoglycemic attack. The EMT described Faria as combative and confused. The EMT documented a two-inch laceration on the back of his head resulting from a blow from the head board of the bed. Also during this incident, Faria bit his tongue.

On June 5, 1997, a hospital report described Faria as disoriented and tremulous while working for the Oak Bluffs Police Department directing traffic. The paramedic described Faria as disoriented and unable to answer questions. He was transported to the hospital. On July 27, 1997, Faria was again described by an EMT as unresponsive and combative. During this episode, Faria again spit out an attempted administration of glucose by the mouth.

Additionally, medical records from the Bethesda Memorial Hospital in Boynton Beach, Florida reveal that Faria experienced at least three disabling hypoglycemic attacks between June, 1992 and January, 1993. The records indicate that Faria was discovered unresponsive and taken to the emergency room all three times.

Additionally, Lt. Schime witnessed an unreported hypoglycemic attack where Faria was disoriented and combative. During this incident Faria scuffled with a fellow officer and had to be restrained by several police officers before the nurse could administer glucose. This incident occurred about a month before Faria left PBSO.

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DISCUSSION

I. Summary Judgment Standard

The standard to be applied in reviewing a summary judgment motion is stated unambiguously in Rule 56c of the Federal Rules of Civil Procedure:

> The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

Summary judgment may be entered only where there is *no* genuine issue of material fact. *See Twiss v. Kury*, 25 F.3d 1551 (11th Cir. 1994). The moving party has the burden of meeting this exacting standard. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157 (1970).

In applying this standard, the district court must view the evidence and all factual inferences therefrom in the light most favorable to the party opposing the motion. *Id.* However, the non-moving party:

> [m]ay not rest upon the mere allegations and denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial.

Fed.R.Civ.P. 56(e). "The mere existence of a scintilla of evidence in support of the [non-movant's] position will be insufficient; there must be evidence on which the jury could reasonably find for the [non-movant]." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986). The party opposing summary judgment "must do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita Elec. Indus. Co. v. Zenith Radio*, 475 U.S. 574, 586 (1986). In determining whether this evidentiary threshold has been met, the trial court "must view the evidence presented through the prism of the substantive evidentiary burden" applicable to the particular cause of action before it. *Anderson*, 477 U.S. at 254. If the non-movant in a summary judgment action fails to adduce evidence which would be sufficient, when viewed in a light most favorable to the non-movant, to support a jury finding for the non-movant, summary judgment may be granted. *Id.* at 254-55.

Additionally, the non-moving party must "make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986). The failure of proof concerning an essential element of the non-moving party's case necessarily renders all other facts immaterial and requires the court to grant the motion for summary judgment. *Id.*

II. Legal Analysis of the ADA Claim

Faria claims that Palm Beach discriminated against him by denying him employment as a police officer because he is an insulin-dependent diabetic. Section 1 of the Americans

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With Disabilities Act ("ADA") prohibits a "covered" employer from discriminating against a qualified disabled person with respect to "the hiring, advancement or discharge of employees, and employee compensation, job training, and other terms conditions, and privileges of employment." 42 U.S.C. §12112(a).

In order to establish a *prima facie* case of discrimination under the ADA, Faria must prove that: (1) he has a disability; (2) he is a qualified individual; and (3) he was discriminated against because of his disability. See 42 U.S.C. § 12132.

III. Disability

The Court will examine whether Faria has a disability as defined by the ADA. The ADA defines a "disability" as: (A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual; (B) a record of such impairment; or (C) being regarded as having such an impairment. *Id.* § 12102(2). It is undisputed that Faria's diabetic condition is an impairment with respect to the ADA. The issue presented here is whether the impairment is also a disability. Does Faria's insulin-dependent diabetes "substantially limit" one of his "major life activities?"

Palm Beach argues that none of Faria's major life activities are "substantially limited."[4] Specifically, they argue that Faria's ability to work has not been "substantially

4. Palm Beach notes Faria's deposition testimony where he states that his diabetes does not limit any of his everyday activities. (Faria depo. pp. 240-41)

limited." An impairment "substantially limits" the major life activity of working, when the impaired is "significantly restricted in the ability to perform either a class of jobs or a broad range of jobs in various classes as to compared to the average person having comparable training, skills and abilities. The inability to perform a single, particular job, does not constitute a substantial limitation in the major life activity of working." 29 C.F.R. § 1630.2(j)(3)(i); *Gordon v. E.L. Hamm & Associates, Inc.*, 100 F.3d 907, 912 (11th Cir. 1996). In other words, Palm Beach claims that to establish a disability because one's ability to work is substantially limited, an impairment must limit employment generally.

However, in *Harris v. H & W Contracting Co.*, the Eleventh Circuit looked to the appendix to the Code of Federal Regulations. 102 F.3d 516, 520-21 (11th Cir. 1997). The appendix states "[t]he determination of whether an individual is substantially limited in a major life activity must be made on a case by case basis, without regard to mitigating measures such as medicines, or assistive or prosthetic devices." 29 C.F.R. app. § 1630.2(j) (1996). In fact the appendix specifically refers to diabetics. "[A] diabetic who without insulin would lapse into a coma would be substantially limited because the individual cannot perform major life activities without the aid of medication." *Id.*

According to *Harris*, Faria has a disability. Although he may not be substantially limited with respect to major life activities, including work, with medication, without medication he certainly would be. Therefore, Faria has satisfied the first element of the *prima facie* case of discrimination under the ADA. Under the ADA's definition, Faria has a disability.

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IV. Qualified Individual

Next, the Court examines whether Faria is a qualified individual under the ADA. The ADA provides that an employer may not "discriminate against a qualified individual with a disability because of the disability . . . ." 42 U.S.C. § 12112(a). A qualified individual is a person who is able to perform the essential functions of the job with or without reasonable accommodation. 29 C.F.R. § 1630.2(m).

However, an employer need not employ a disabled person if he possesses a direct threat to the health or safety of himself or others. 42 U.S.C. § 12111(3). There is no direct threat defense, though, if the employer could have made "reasonable accommodation[s]." 42 U.S.C. 12113(a). A direct threat is a significant risk to the health or safety of others that cannot be eliminated by reasonable accommodations or more specifically by modification of policies, practices or procedures or by the provision of auxiliary aids or services. 42 U.S.C. 12111(9); 29 C.F.R. § 1630.2(o)(2). The employee retains at all times the burden of showing that he was not a direct threat or that reasonable accommodation was available to eliminate the threat. *Moses v. American Nonwovens, Inc.*, 97 F.3d 446, 446 (1996).

Here, Palm Beach admits that it did not hire Faria because he was diabetic. Therefore, the issues are whether Faria produced enough evidence from which a reasonable jury could conclude (1) that he was not a direct threat or (2) that reasonable accommodations were available. *Moses*, 97 F.3d at 447.

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To defeat a motion for summary judgment, the nonmoving party must raise "significant probative evidence" that is "sufficient" for the jury "to return a verdict for that party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). Faria has not met this standard. Faria has suffered numerous hypoglycemic attacks. The record indicates ten documented hypoglycemic incidents in the last six years. Many more are alleged. Additionally, the record clearly indicates that not only is Faria disoriented during these hypoglycemic attacks, but he can be combative. Faria offers no evidence countering the evidence that he can be combative and aggressive during these diabetic attacks.

The only evidence Faria produces to prove he is not a direct threat is his affidavit stating that during the reported hypoglycemic attacks occurring at PBSO, no one was injured. However, one of the hospital reports from Martha's Vineyard reveals that during one of Faria's hypoglycemic attacks he badly cut the back of his head and lacerated his tongue with a bite. Additionally, the claim that no one has been hurt in the past is not "significant" evidence that no one will be injured in the future.

Faria states in his affidavit that if reasonably accommodated he could perform his duties as a police officer. However, no reasonable accommodations exist that would eliminate the threat of future attacks. These attacks sometimes take place without warning as evidenced by the fact that Faria has suffered numerous attacks at his home where he can accommodate himself in whatever manner he chooses. Additionally, Faria's previous employers have not prevented him from accommodating himself in the manner he needs to

prevent these attacks, yet the attacks have still occurred. Faria has been able to carry the snacks, glucose tablets, and blood testing kit that he needs.

Faria's affidavit states that three of the hypoglycemic attacks occurred because he was not accommodated. The alleged lack of accommodation occurred when Faria requested relief from a coworker so that he could nourish himself in order to prevent hypoglycemic attack. The relief arrived late. However, as a police officer, consistently involved in dangerous and stressful situations, relief to nourish oneself is not always available. It is not reasonable to suggest that Palm Beach must have relief quickly available at all times to accommodate Faria.

Faria has not satisfied the second element of the *prima facie* case. No genuine issues of material fact exist with respect to whether Faria is a qualified individual under the ADA. Therefore, Palm Beach is entitled to a judgment as a matter of law.[5]

CONCLUSION

Based on the foregoing, it is ORDERED AND ADJUDGED that the Motion be, and the same is hereby, GRANTED.

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5. Faria must satisfy all three elements of the *prima facie* case to support a claim of discrimination under the ADA. He has not met his burden with respect to the second element. Therefore, the Court does not address the third element of the claim.

Appendix B

DONE AND ORDERED in Chambers at Miami, Florida, this 10th day of November, 1997.

s/ K. Michael Moore
K. MICHAEL MOORE
UNITED STATES DISTRICT JUDGE

CC: John S. Trimper, Esq.
George Arthur Lane, Esq.

Supreme Court, U.S.
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(2)

No. 98-1497

IN THE

Supreme Court of the United States

GRAHAM C. FARIA,

Petitioner,

v.

TOWN OF PALM BEACH,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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I. The district court's decision granting summary judgment is sustainable regardless of whether the burden to prove a direct threat of harm rests with the plaintiff or defendant. 5

II. There is no conflict between the decision of the Eleventh Circuit in this case and other circuit courts on whether the burden to prove a direct threat rests with the plaintiff or defendant. 7

III. There is no squarely presented conflict among the circuit courts on whether the burden to prove a direct threat of harm rests with the plaintiff or defendant. 7

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TABLE OF APPENDICES

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App. — Appendix

Pet. — Petition for Writ of Certiorari

STATEMENT OF THE CASE

Petitioner is an insulin-dependent diabetic. He applied for employment as a police officer with the Town of Palm Beach, Florida ("Town") in February, 1994. At the time, Petitioner was employed by the Palm Beach County Sheriff's Office ("PBSO") as a corrections officer. Following a physical agility test, written test and personal interviews, Petitioner's name was placed on the eligibility list for employment. In July, 1994, Petitioner was informed of a conditional offer of acceptance and that he would be required to undergo a background investigation, psychological examination and a medical examination by the Town's physician. Following the conditional offer of acceptance, the Town conducted a background investigation and obtained records from Petitioner's employment with the PBSO indicating that Petitioner had experienced at least three disabling episodes of hypoglycemic shock or hypoglycemic attacks while on duty at the PBSO detention facility and during the time he attended the police academy.

The records from the PBSO indicate that Petitioner suffered a disabling hypoglycemic attack in a control room at the detention facility on February 7, 1994. Petitioner is described as incoherent, unresponsive, oblivious to his surroundings, swinging his arms wildly and glassy eyed. Petitioner locked himself in the control room and it took five minutes before other officers could gain access to the area. The report states that Petitioner had a similar incident in a control room approximately a year and a half before. Petitioner's supervisor reported that this was about the fourth or fifth time Petitioner has had one of these seizures. Moreover, the records from the PBSO reveal that Petitioner suffered a hypoglycemic attack in January 1992 while

attending the Police Academy. He is described as sweating, disoriented, unable to support himself and unable to stay awake unless prodded.

Petitioner contends that a reasonable accommodation to lessen the likelihood of these attacks is that he carry snacks, glucose tablets and a blood testing kit on his person. At the time of the hypoglycemic attack on February 7, 1994 Petitioner had a food bar available but it was not sufficient to raise his blood sugar level due to his flu symptoms and vomiting shortly before. Petitioner had no glucose tablets on his person. Similarly, Petitioner did not have food or glucose tablets on his person when he suffered the other disabling hypoglycemic attacks while on duty with the PBSO.

The Town's physician, Joseph Ojea, M.D., reviewed the PBSO reports prior to the Petitioner's pre-employment medical examination on September 29, 1994. Dr. Ojea discussed the reports with the Petitioner during the medical examination and Dr. Ojea concluded that the likelihood of hypoglycemic attacks constituted a significant risk to the health or safety of others that could not be adequately lessened by reasonable accommodation. The risk is that Petitioner is likely to suffer hypoglycemic attacks, confusional states and blackouts while on the road, while in emergency situations and in situations that require his full attention. Dr. Ojea concluded that the Petitioner suffers from a condition known as "hypoglycemic unawareness" where the attacks occur quickly and with little warning. Petitioner was notified by the Town's Personnel Director on October 5, 1994 that he would not be hired for the position of police officer.

The first paragraph in Petitioner's Statement of the Case purports to be "statements made by Dr. Ojea to the Petitioner during the pre-employment medical examination." In fact, it does not accurately quote Dr. Ojea. The language does not come from Dr. Ojea's deposition or even the Plaintiff's deposition but from Petitioner's self-serving affidavit that was filed in response to the Town's motion for summary judgment. In the affidavit, Petitioner contends that Dr. Ojea "misdiagnosed" him in terms of his pattern of "hypoglycemic unawareness." However, Petitioner offered no medical evidence to refute Dr. Ojea's expert testimony. Petitioner offered no medical evidence that his condition does not pose a significant risk to the health or safety of others. Petitioner offered no medical evidence as to whether a reasonable accommodation could lessen the likelihood or severity of his recurring hypoglycemic attacks.

It is noteworthy that the record before the district court contains evidence of at least eight documented disabling hypoglycemic attacks that occurred from June, 1992 to July, 1997 that were not known to the Town at the time of the employment decision. Petitioner experienced hypoglycemic attacks while on duty as a part-time police officer with the Oak Bluffs, Massachusetts Police Department where he worked from May, 1995 until August, 1997. One hypoglycemic attack occurred while Petitioner was directing traffic at a construction site and he was described as oblivious, sweating and weak. During several other hypoglycemic attacks that occurred after May, 1995, Petitioner is described as ranging from unresponsive and confused to combative. On several such occasions Petitioner had to be physically restrained and on one occasion he was so out of control that he sustained a laceration on his head and bit his tongue.

The district court granted summary judgment in favor of the Town on the grounds that "[n]o genuine issues of material fact exist with respect to whether . . . [the Petitioner] . . . is a qualified individual under the ADA". App. 13a. The district court notes that Petitioner offers no evidence contrary to the evidence that he is disoriented and can be combative and aggressive during these diabetic attacks. App. 12a.

Petitioner contends that the district court placed the burden on the Petitioner to prove a negative — that he would not present a direct threat if hired as a police officer. Pet. at 5. This statement is not only illogical but is a misstatement of the law. Because the essential job functions of a police officer reasonably implicates the safety of others, the district court determined that the Petitioner must demonstrate that he is "qualified" in that he can perform the job functions in a way that does not endanger others. No evidence was presented to the district court upon which a jury could reasonably find that the Petitioner's proposed accommodation would lessen the risk of hypoglycemic attacks. Conversely, the evidence was only susceptible to the conclusion that the Petitioner's proposed accommodation has repeatedly failed. *See* App. 12a.

On appeal the Eleventh Circuit Court of Appeal affirmed *per curiam* even considering only the facts known to the Town at the time of the employment decision and disregarding the evidence of the eight other documented hypoglycemic attacks.

REASONS FOR DENYING THE WRIT

I.

THE DISTRICT COURT'S DECISION GRANTING SUMMARY JUDGMENT IS SUSTAINABLE REGARDLESS OF WHETHER THE BURDEN TO PROVE A DIRECT THREAT OF HARM RESTS WITH THE PLAINTIFF OR DEFENDANT.

The district court's decision granting summary judgment is sustainable no matter who had the burden of proof. The record before the district court indicates that the Petitioner had ten documented hypoglycemic attacks in the last six years and many more were alleged. App. 12a. The district court notes that the Petitioner was both disoriented and combative during these hypoglycemic attacks and the Petitioner offered no contrary evidence that he was not disoriented, combative and aggressive. App. 12a.

Petitioner's only contrary response to the overwhelming evidence of direct threat is his affidavit stating that no one was injured as a result of his hypoglycemic attacks. However, the district court judge notes that Petitioner cut his head and bit his tongue during one of his hypoglycemic attacks. App. 12a. Moreover, the Petitioner's claim that no one has been hurt in the past is not "significant" evidence that no one will be injured in the future. App. 12a. Persons with diabetes have been lawfully excluded from employment because of the *potential* impact upon the public safety despite the fact that there has not been any actual injury. (emphasis provided). *See E.G. Daugherty v. City of El Paso*, 56 F.3d 695, 698 (5th Cir. 1995), *cert. denied*, 516 U.S. 1172 (1996) (insulin-dependent diabetic bus driver

is not "otherwise qualified" because of substantial risk that he could injure himself or others); *Amariglio v. National Railroad Passenger Corp.*, 941 F. Supp. 173, 179 (D. Ct. 1996) (passenger train attendant with poorly controlled diabetes cannot perform essential functions of the position without creating substantial risk of harm to passengers); *Myers v. Hose*, 50 F.3d 278, 282 (4th Cir. 1995) (bus driver with poorly controlled diabetes would profoundly compromise the safety of passengers, pedestrians, and other motorists and is, therefore, unable to perform essential job duties).

The district court's decision granting summary judgment notes that the Petitioner's hypoglycemic attacks continued to occur even though his previous employers allowed him the accommodation of carrying snacks, glucose tablets and a blood testing kit. App. 13a. The record before the district court is susceptible only to the conclusion that petitioner represents a direct threat to the health or safety of others in the workplace and that his proposed reasonable accommodation has repeatedly failed. App. 12a-13a.

Sup. Ct. R. 10 provides that a petition for a writ of certiorari will be granted only for "compelling reasons". Because the district court's decision granting summary judgment is sustainable no matter whether plaintiff or defendant had the burden of proof, the petitioner seeks what is, in effect, review in the abstract. Even if the suggested conflict as to which party bears the burden of proof was resolved in the abstract, the summary judgment in this case would still be affirmed. There is no "compelling reason" to grant the Petition for Writ of Certiorari in this case.

II.

THERE IS NO CONFLICT BETWEEN THE DECISION OF THE ELEVENTH CIRCUIT IN THIS CASE AND OTHER CIRCUIT COURTS ON WHETHER THE BURDEN TO PROVE A DIRECT THREAT RESTS WITH THE PLAINTIFF OR DEFENDANT.

The Petitioner urges the Court to grant review in this case "to resolve the conflict among the circuit courts on whether the burden to prove a direct threat rests with the plaintiff or defendant." Pet. at 6. However, the review sought in this case is from a decision of the Eleventh Circuit Court of Appeals, which, *per curiam*, affirmed a summary judgment. App. 1a. There is nothing on the face of the decision in this case from which it can be said that it conflicts with decisions of the Fifth and Eighth Circuit Courts of Appeal that are cited by the Petitioner. Pet. at 7.

III.

THERE IS NO SQUARELY PRESENTED CONFLICT AMONG THE CIRCUIT COURTS ON WHETHER THE BURDEN TO PROVE A DIRECT THREAT OF HARM RESTS WITH THE PLAINTIFF OR DEFENDANT.

The Petitioner argues that the Eleventh and First Circuit Courts of Appeal have squarely held that it is the plaintiff's burden to prove that the employee or job applicant does not pose a direct threat of harm and that the Fifth and Eighth Circuit Courts of Appeal have squarely held that it is the defendant's burden. The petitioner's argument misstates the law in the Fifth and Eighth Circuits.

Petitioner cites the decision of *Rizzo v. Children's World Learning Centers*, 84 F.3d 758 (5th Cir. 1996) ("*Rizzo I*") as holding that the direct threat issue is an affirmative defense on which the employer bears the burden of proof. In *Rizzo I* the Fifth Circuit reversed a summary judgment in favor of the employer and remanded the case for jury trial. However, following judgment on jury verdict, the case was again appealed to the Fifth Circuit and a second decision was recently rendered in *Rizzo v. Children's World Learning Centers*, __ F.3d __ 1999 WL 219009 (5th Cir. (Tex.), Apr. 15, 1999) ("*Rizzo II*"). In *Rizzo II* the Fifth Circuit states that a thorough reading of the caselaw and the regulations reveal that there is "no conflict at all" between the Fifth and the Eleventh Circuits.

> We, therefore, agree with the Eleventh Circuit that the burden of proof is on the plaintiff to prove that, as a qualified individual, she is not a direct threat to herself or to others.

1999 WL 219009, *3.

The Fifth Circuit goes on to state that when an employer imposes a safety requirement that screens out or tends to screen out a class of individuals with disabilities, the burden of proof shifts to the employer to prove that the employee is, in fact, a direct threat to the health or safety of herself or others. 1999 WL 219009, *3. The burden of proof is on the defendant only in cases concerning "safety requirements that tend to screen out an individual with a disability or a class of individuals with disabilities." 1999 WL 219009, *3. Otherwise, the plaintiff has the burden of proving that he or she can perform the essential functions of the job that the plaintiff holds or desires and that the plaintiff does not

pose a direct threat to the health or safety of self or others. 1999 WL 219009, *6. In short, the Fifth Circuit is in agreement with the Eleventh Circuit in holding that the qualification standard includes the requirement that an individual not pose a direct threat to the health or safety of others in the workplace. *See* 42 U.S.C. § 12113(b).

Petitioner concedes that the direct threat issue was not presented in *Benson v. Northwest Airlines, Inc.*, 62 F.3d 1108 (8th Cir. 1995). *Benson* simply discusses the three-step method for allocating burdens of persuasion and production in an ADA case. An ADA plaintiff has the initial burden of making out a prima facie case of discrimination and that reasonable accommodation is possible. Once a prima facie case is made out, the second step occurs and the burden of production shifts to the employer to show that it is unable to reasonably accommodate the employee. 62 F.2d at 1112. If the employer offers evidence that the employee cannot perform the essential functions of the job even with reasonably accommodation, the burden shifts back to the employee to prove that the employer's proffered reason is a pretext for discrimination. The plaintiff's burden to prove pretext merges with his ultimate burden of persuasion. 62 F.2d at 1112; *see St. Mary's Honor Center v. Hicks*, 113 S. Ct. 2742, 2752 (1993) (ultimate burden of persuading trier of fact that defendant intentionally discriminated against plaintiff remains at all times with plaintiff). The general discussion of the burdens of persuasion and production in *Benson* does not specifically deal with the issue of direct threat and, therefore, it cannot be said that *Benson* presents a conflict with the Eleventh Circuit or the First Circuit on a "same important matter". *See* Sup. Ct. R. 10(a).

Petitioner correctly notes that the burden of proof on the issue of direct threat was not squarely presented in the Seventh Circuit decision of *E.E.O.C. v. AIC Security Investigations, Ltd.*, 55 F.3d 1276 (7th Cir. 1995). There, the court of appeal reviewed jury instructions that required the jury to consider whether the plaintiff posed a danger to workplace safety in the performance of an essential function of his job. 55 F.3d at 1284.

The most definitive analysis of the direct threat provisions of 42 U.S.C. §§ 12113(b) and 12111(3) is found in *EEOC v. Amego*, 110 F.3d 135 (1st Cir. 1997). The First Circuit examined the legislative history of the ADA as well as the Rehabilitation Act of 1993 ("Rehabilitation Act") with respect to this issue. Under § 504 of the Rehabilitation Act, the question of whether a plaintiff poses a risk to the health or safety of others is analyzed in the context of whether the plaintiff is "otherwise qualified". The qualification analysis under the Rehabilitation Act is an issue for which the plaintiff bears the burden of proof. *See School Board of Nassau County v. Arline*, 480 U.S. 273, 287-88, 106 S. Ct. 1123, 1130-31 (1987).

The ADA expressly provides that qualification standards *may* include a requirement that an individual not pose a direct threat to the health or safety of other individuals in the workplace. 42 U.S.C. § 12113(b) (emphasis provided). Where the essential job functions *necessarily* implicate the safety of others, a plaintiff must demonstrate that he can perform those functions in a way that does not endanger others. *Amego*, 110 F.3d at 114. (emphasis provided). The essential job functions of a police officer necessarily implicates the safety of others and an applicant has the burden to prove that he poses no risk of harm to others. Otherwise, the anomalous result is that there would

be a lesser burden of proving the qualifications for a plaintiff where the job involves the care and safety of others than when the job does not involve a safety risk to others. *See Amego*, 110 F.3d at 144. It is inconceivable that Congress intended to weaken the burden on plaintiffs to prove that they are qualified where the essential job functions implicate the safety of others. *Id.*, at 144. The Eleventh Circuit similarly holds that the ADA "qualification standard" includes the requirement that an individual shall not pose a direct threat to the health or safety of other individuals in the workplace. *Moses v. American Nonwovens, Inc.*, 97 F.3d 446, 447 (11th Cir. 1996).

While there is some language in the Fifth Circuit and Eighth Circuit decisions cited by the petitioner which may at first blush appear to present a conflict with the Eleventh Circuit and First Circuit decisions, it cannot be said that a conflict is squarely presented. In light of *Rizzo II*, there is the clear expression from the Fifth Circuit that there is, in fact, no conflict. In any event, certiorari may be properly denied so to defer an issue until it can have the benefit of consideration by several lower courts, or until culminating events provide a better perspective for decision. Wright, Miller & Cooper, *Federal Practice and Procedure: Jurisdiction 2D § 4004.1* (1996). Any possible conflict between the circuits as to which party bears the burden under the ADA to prove direct threat has not fully developed, if it can be said that there is any conflict at all. It is preferable to allow further analysis by lower courts in order to more fully develop and crystallize the issue.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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